U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: SEP 1 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel DiTonno for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (the DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum requirements stated on the labor certification. Specifically, the director determined that the beneficiary did not possess the required sixty months of experience in the offered job of architect.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel asserted that the beneficiary possesses the required education and more than fifteen years of progressively responsible experience in the field of architecture. Counsel stated that the petitioner possesses the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel included copies of previously submitted documentation as well as new documents in support of the appeal.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The primary issue in the instant case is whether the beneficiary possessed the required sixty months of experience as an architect as of the priority date of the ETA Form 9089.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Relying in part on *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, at 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d at 1015; *See also K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See Madany* v. *Smith,* 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain*

language of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. §§ 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). *See also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the petition has a priority date of October 21, 2011, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). At Parts H.1., to H.3., of the ETA Form 9089, the petitioner indicated that the primary worksite was an address in In addition, the required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. Part H of ETA Form 9089 states in pertinent part that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in architecture.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.

At Part H.11., of the ETA Form 9089, the petitioner described the job duties of architect as follows:

> Involvement in all phases of residential construction projects valued in excess of one million dollars from marketing, winning design competitions or bids, preparing proposals, initial discussion with the client, through the final delivery of the completed structure in consultation and collaboration with the licensed professionals, including registered architects, when required by law. Programming for construction projects, including identification of economic, legal, and natural constraints and determination of the scope and spatial relationship of functional elements; recommending and overseeing appropriate construction project delivery systems with solid marble slabs, structural wood sections and integrated aesthetic patterns; consulting, investigating, and analyzing the design, form, aesthetics, materials, and construction technology used for the construction, enlargement, or alteration of a building or environs and providing expert opinion and testimony as necessary. No license required.

It is noted that the petitioner indicated that no license was required for the position of architect at Part H.11. The official website of the Texas Secretary of State at http://www.sos.state.tx.us/siteindex.shtml (accessed August 28, 2013) provides public access to the Texas Administrative Code (TAC). Title 22 Examining Boards, Part 1 Texas Board of Architectural Examiners, Chapter 1 Architects, Subchapter A

Scope; Definitions, Rule §1.5 Terms Defined Herein, at (6), (45), (52), and (53) of the TAC defines architect as "An individual who holds a valid Texas architectural registration certificate granted by the Board.," nonregistrant as "An individual who is not an architect.," registered as "Licensed.," and registrant as "Architect.," respectively. The record is absent any explanation as to how the offered job of architect with a primary worksite in Aransas, Texas is to be performed by an individual without a Texas architect's license when the state of Texas requires architects to be licensed. Furthermore, the record is absent any evidence that the beneficiary is licensed as an architect in the state of Texas.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a bachelor's degree in architecture from the The AAO notes that the record instead indicates that the beneficiary received his Licentiate in Architecture in 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record contains a copy of the beneficiary's "Licenciado en Arquitectura" awarded by as well as corresponding copies of transcripts from this academic institution. It is noted that counsel provided certified English translations of these Spanish language documents on appeal.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[3] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/about/. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[4] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[5]

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[3] According to its website, "AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world."

[4] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

[5] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations

According to EDGE, it is reasonable to conclude that the beneficiary's four-year "Licenciado en Arquitectura" from Mexico is the foreign equivalent to a U.S. bachelor's degree in architecture. Therefore, the beneficiary possesses the required education as listed at Part H.4., of the ETA Form 9089.

Next it must be determined whether the beneficiary possesses the sixty months of experience in the offered job of architect as required by the labor certification. Part J of the labor certification states the following in pertinent part regarding the beneficiary's experience as it relates to the proffered position's requirements:

J.18. Does the alien have the experience required for the requested job opportunity indicated in question H.6 (the job offered)? Yes.
J.21. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested? No.
J.23. Is the alien currently employed by the petitioning employer? Yes.

The petitioner indicated that the beneficiary had not gained any of the qualifying experience with the petitioner in a position substantially comparable to the job opportunity requested in J.21., but responded affirmatively when asked if the beneficiary was currently employed by the petitioner in J.23.

The ETA Form 9089 at Part K reflects that the beneficiary gained qualifying experience in the offered position of architect based upon his employment in this position with the petitioner from October 5, 2010 through the priority date of October 21, 2011. Nevertheless, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.[6] Specifically, in response to question J.21., which asks, "Did

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submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

[6] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the

the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner answered "No." The petitioner specifically indicated that 60 months of experience in the job offered is required at H.6. In general, if the answer to question J.21., is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[7] and the terms of the ETA Form 9089 at H.10., provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates that his position with the petitioner was as an architect and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. In addition, even if the beneficiary's employment with the petitioner was considered qualifying experience, such employment would amount to only 12 months of experience in the proffered position of architect, rather than the 60 months of experience in the offered job required by the labor certification. As such, the beneficiary's experience with the petitioner may not be used to qualify the beneficiary for the proffered position of architect for any of the 60 months of experience in the offered job as required by the ETA Form 9089.

The ETA Form 9089 at Part K further reflects that the beneficiary gained qualifying experience as a "project manager" employed by , in Spring, Texas from January 29, 2010 to September 25, 2010, and as a "project manager" employed by , in San Antonio, Texas from May 13, 2008 to January 29, 2010. It is noted that the beneficiary's job duties as a "project manager" for both . and , are listed as "Project design and supervision. Supervisor: self-." The descriptions of the beneficiary's duties as a "project manager" for both Inc. and are limited and do not encompass the multiple and complex duties of the offered job of architect as listed at Part H.11., of the ETA Form 9089. It is further noted that even if the beneficiary's employment with both and was to be considered qualifying experience, such employment would amount to only approximately 28 months of experience, rather than the 60 months of experience in the offered job required by the labor certification.

The record contains the following documents submitted in support of the beneficiary's claims of employment for and

- A letter dated April 19, 2010 that is signed by Founding Principal and School Leader of In her letter, stated that she had become aware of the beneficiary after visiting one of his

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time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[7] A definition of "substantially comparable" is found in the preceding footnote in the paragraph immediately above marked as (ii).

architectural accomplishments in Houston, Texas. praised the beneficiary's ability to transform a basic construction into an art project and attention to detail. indicated that the beneficiary's work resulted in their home being not only a functional and beautiful building but one that stands out artistically encompassing and embracing the entire environment in which it was developed.

- A letter dated April 22, 2010 that is signed by of the . In his letter, stated that beneficiary had won a first place award for his pool design from our noted that the beneficiary was his favorite artist.

- A letter dated April 19, 2010 that is signed by President of in Tomball, Texas. In his letter, declared that he was aware of the beneficiary's work and noted that he was an artist of construction and architecture.

- A letter dated April 20, 2010 that is signed by Senior Vice President of In his letter, stated that he had become aware of the beneficiary and his work based upon a friend's recommendation. declared that he had hired the beneficiary to construct his ranch and that the final product could be translated into one word, satisfaction. asserted that the beneficiary had utilized new and original methods in the construction which resulted in finished product full of art in every detail.

- A letter dated April 23, 2010 that is signed by In his letter, noted that he was personally experienced with the beneficiary's work and that the beneficiary was currently working on a design project at his ranch. praised the beneficiary's enthusiasm and talent and noted that he would recommend the beneficiary to any potential client.

- A letter dated April 27, 2010 that is signed by Managing Director of In his letter, stated that after an intensive search he knew the beneficiary was the only individual who could achieve the design and construction of his family legacy project. declared that the beneficiary had created a house together with a barn that were perfectly harmonious with the result being beautiful, exceptional, and creative.

- A letter dated April 19, 2010 that is signed by Managing Director of In his letter, indicated he chose the beneficiary's proposal from , to design and build his ranch, Santa Teresa, in a contest he conducted to decide who would be awarded the project. praised final product as unique with good taste and artistic work being translated into the construction.

- A letter dated April 19, 2010 that is signed by . In his letter, stated that his group was interested in constructing a thirty-five story building that would be an icon in the Galleria area of Houston, Texas. declared that the work and development that was presented by the beneficiary and , was what he was looking for and accomplished all of his artistic points of view.

- A letter dated April 13, 2010 that is signed by , Director of . In his letter, certified that the beneficiary and had won a bidding contest amongst various firms to design a new tennis club in Spring, Texas because of the beneficiary's original and artistic presentation.

- A letter dated October 17, 2012 that is signed by , Certified Public Accountant, Tax Partner of . In his letter, stated that he was the beneficiary's accountant during the period the beneficiary worked as project manager for his company, indicated that the company conducted business operations in construction and it was his understanding that the beneficiary was an architect by trade.

- A professional services contract between the beneficiary as "THE SUPPLIER" and , as "THE OWNER" that is dated February 8, 2008. The contract relates to "THE PROPERTY" currently under construction located at , Texas and states that the purpose of the contract is as follows:

  > The purpose of this contract is the provision of supervision services that should be done by THE SUPPLIER in order to supervise the work and projects that are done on THE PROPERY[sic] under the indications, blueprints and specification given and indicated by THE OWNER.

- A letter dated October 17, 2012 that is signed by , Broker/Owner of in the Woodlands, Texas. In his letter, declared that knew the beneficiary throughout his employment as project manager for in San Antonio, Texas from May 13, 2008 to January 29, 2010. noted his company helped the beneficiary with property research for projects he worked on with

The AAO finds that the information contained in the letters above is conclusary in nature with statements attesting to the beneficiary's having been hired to design and oversee the construction of a variety of buildings and structures without providing any specific details or descriptions of the beneficiary's duties. In addition, many of these letters and the professional services contract serve to

confirm that the beneficiary had been employed as a project manager by both and , rather than an architect. Although these documents are accompanied by illustrated renderings of different buildings and construction projects, such illustrations appear to be part of initial presentations rather than evidence of completed projects.

The record also contains documentation indicating that the beneficiary was an entrant in the , in 1990. While such documentation establishes that the applicant entered this competition as student, it does not establish that the beneficiary possessed the 60 months of experience as an architect required by the labor certification.

Finally, it must be noted that the beneficiary has claimed employment as an assistant architect from 1989 to 1993 and then as an architect from 1993 until 2002 at in Hidalgo, Mexico. In addition, the beneficiary claimed that he was the owner of his own company, in Mexico City, Mexico from 2002 to 2008. The record contains a large volume of documentation including letters, illustrations, photographs, and maps reflecting the beneficiary's involvement with a variety of construction projects ranging from alterations, renovations, and construction for a restaurant chain, apartment buildings, high-end single family residences, residential developments, churches, and resort properties. However, the beneficiary's work experience for his own company, , was not listed at Part K., of the ETA Form 9089. Neither the beneficiary nor the petitioner has offered any explanation as to why the beneficiary's employment with was not listed on the labor certification if this experience qualified him for the offered job of architect. For these reasons, the beneficiary's employment with may not be used to establish the beneficiary's work experience. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976) (where the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification lessens the credibility of the evidence and facts asserted). The AAO finds that the petitioner has demonstrated the beneficiary's experience with from 1993 to 2002. However, the beneficiary did not receive his Licenciatura en Arquitectura until 2003. Thus, the AAO does not find this to be qualifying experience as an architect.

On May 24, 2013, the AAO issued a Notice of Intent to Dismiss/Request for Evidence (NOID/RFE) to the petitioner and counsel in which the AAO noted that the record did not contain sufficient evidence demonstrating that the beneficiary possessed the 60 months of experience in the offered job of architect as required by the ETA form 9089. In addition, the AAO informed the petitioner and counsel that evidence in the record relating to the beneficiary's employment with and including the letters of and as well as the professional services contract between the beneficiary and tended to establish that the beneficiary had been employed by these enterprises as a project manager rather than an architect. The AAO informed the petitioner and counsel that it intended to dismiss the appeal because the evidence in the record does not establish that the beneficiary possessed the required five years of experience in the offered job as architect by the priority date. The petitioner and counsel were informed that they were being provided an opportunity to rebut this derogatory information pursuant to 8 C.F.R. § 103.2(b)(13)(i).

The AAO also requested that the petitioner provide the following evidence:

- The petitioner's 2012 corporate federal income tax return.
- The beneficiary's 2012 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement.
- A list of the names, titles and annual salaries of the petitioner's employees on October 21, 2011.
- A copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2011.
- A copy of the purchase agreement between the shareholders of the petitioner and .
- The names of the shareholders and officers of the petitioner on October 21, 2011.
- Statement regarding whether the beneficiary has ever been an officer and/or owner of the petitioner, and, if so, the relevant dates in that capacity or capacities.

Counsel and the petitioner were given 30 days to respond to the NOID/RFE.

In response, counsel notes that the beneficiary's employment as an architect and project manager with , and during various periods from 2004 to 2010 constituted at least five years of qualifying experience in the offered job of architect as required by the labor certification.

Counsel submits an advertisement for a seminar regarding residential real estate occurring June 22, 2013 in the , Texas, that included the beneficiary as member of the seminar panel and listed him as an architect. However, the fact that an advertisement listed the beneficiary as an architect neither qualifies him as such nor establishes that he possessed the 60 months of experience in the offered job of architect required by the labor certification.

Counsel submits three separate each with a corresponding photograph of the award subject that were presented to the beneficiary by the However, the fact that the beneficiary has been recognized for his achievements in designing residential water features and a residential pool does not establish that the beneficiary possessed the required 60 months of experience in the offered job as architect as of the priority date.

Counsel submits two Spanish language advertisements, one for a resort in the Texas and the other for an event and banquet location in Texas. While the advertisement for the resort attributes the design of the project to the beneficiary, the advertisement for the event and banquet location makes no mention of the beneficiary.

Counsel submits a newspaper article regarding a local restaurant from August 16, 2012 edition of , Texas. The article notes "[t]he family

purchased in October 2011 and with the help of architect remodeled the restaurant to give it a more intimate feel." Again, the fact that a newspaper article listed the beneficiary as an architect neither qualifies him as such nor establishes that he possessed the 60 months of experience in the offered job of architect required by the labor certification.

Counsel submits a certificate recognizing the beneficiary as a "Professional Member" of the as of October 18, 2012. However, a review of the publically accessible website of the (accessed August 29, 2013) reveals that a has met the requirements of the Bylaws and the minimum two-years work experience standards. The certificate is not sufficient to demonstrate that the beneficiary possessed the required 60 months of experience in the offered job as architect by the priority date.

Counsel submits an additional letter that is signed by , Managing Director of , in Houston, Texas, and dated June 7, 2013. In this letter, states that the beneficiary under was contracted to design as architect from January to September of 2010. provides a detailed description of the duties performed by the beneficiary.

Counsel submits a letter dated June 14, 2013 that is signed by , Manager of in San Antonio, Antonio Texas. declares that the beneficiary was employed as an architect and project manager by this enterprise from May 13, 2008 to January 29, 2010. includes a detailed description of the duties performed by the beneficiary.

Although both provide a description of the beneficiary's job duties that essentially is the same description of the duties of the offered job of architect as listed at Part H.11., of the ETA Form 9089, neither attested to the fact that the beneficiary was a licensed architect in the state of Texas. Neither provides any explanation as to how the beneficiary was employed as an architect in Texas when the state of Texas requires architects to be licensed and the record is absent any evidence establishing that the beneficiary possesses a Texas architect's license. Once again, it must be noted that even if the beneficiary's employment with both was to be considered qualifying experience, such employment would amount to only approximately 28 months of experience, rather than the 60 months of experience in the offered job required by the labor certification.

Counsel also submits four letters from individuals attesting to the beneficiary's employment with in Mexico City, Mexico in the period from 2004 to 2008. However, as previously discussed, the beneficiary's employment with may not be used to establish the beneficiary's work experience because such experience was not listed at Part K., of the ETA Form 9089.

The evidence in the record is not sufficient to establish that the beneficiary possessed the required 60 months of experience in the offered job of architect as listed at Part H.6., of ETA Form 9089. Therefore, the petition cannot be approved for this reason.

Although not noted as a basis of denial by the director in the decision issued on September 6, 2012, the next issue to be examined in this proceeding is whether the record contains sufficient evidence establishing that the business entity [redacted] is a valid successor-in-interest to the petitioner, [redacted]

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

USCIS has issued no regulations governing immigrant visa petitions filed by successor-in-interest employers. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. The case involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue reads as follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Matter of Dial Auto does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[8] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[9]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[10] *See generally* 19 Am. Jur. 2d *Corporations* § 2170

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[8] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[9] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[10] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights

(2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

With respect to the instant case, evidence in the record shows that the petitioner, was incorporated in the State of Texas on January 1, 2008. The Articles of Incorporation named as the sole director. The ETA Form 9089 was filed with the DOL by on October 21, 2011, and certified by the DOL in the name of on January 9, 2012. As indicated in its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2011, is an S corporation engaged in construction that is wholly owned by . Its Federal Employer Identification Number (FEIN) is . The record contains a copy of the Certificate of Amendment dated September 26, 2012 and a corresponding copy of a Certificate of Filing from the Office of the Secretary of State of Texas dated September 27, 2012, which reflect that the name of the petitioner, , was changed to , effective September 27, 2012. A review of the publically accessible website of the publically accessible website of the Office of the Comptroller of Texas at http://ourcpa.cpa.state.tx.us (accessed August 8, 2013) reveals that presently retains active corporate status in Texas and that its current president and director is

In response to the NOID/RFE issued by AAO on May 24, 2013, counsel asserts that the original petitioner, was purchased by the business entity, in August 2012. Counsel indicates that the petitioner's corporate name was subsequently changed from , to Counsel declares that remains active after the petitioner, was purchased by the business entity, but does not file its own tax returns. Counsel notes that listed its subsidiary corporation, on the IRS Form 851, Affiliations Schedule, attached to its IRS Form 1120, U.S. Corporation Income Tax Return, for 2012. The IRS

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and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Form 1120 tax return of for 2012 indicates that it engaged in construction and lists its FEIN as . The IRS Form 851 Schedule attached to the IRS Form 1120 tax return of lists this business entity as the common parent corporation and with FEIN of as a subsidiary corporation.

In support of the claim that the business entity was a valid successor-in-interest to the original petitioner, counsel submits a copy of a Stock Purchase Agreement dated August 16, 2012, between , owner of as the Seller, and the business entity, ., as the Purchaser. The Stock Purchase Agreement identifies , as the Company. Section 1 of the Stock Purchase states the following:

> Purchase and Sale. Seller hereby agrees to sell to Purchaser, and Purchaser hereby agrees to purchase from seller, a total of One Hundred (100) shares of the Company at a total purchase price of Thirteen Thousand and One Hundred Dollars ($13,100) and further agrees to the terms as follows:
>
> a) Assets to be excluded. Any and all assets of the Company shall be excluded from this agreement and shall remain with .
>
> b) Consideration. Purchaser agrees to pay a total of $13,100 at the time of closing. $100 shall be deemed full satisfaction for shares of the Company and $13,000 shall be given to satisfy a portion of outstanding expenses of the Company.
>
> c) Assumption of Liabilities. Purchaser shall not be responsible for any liabilities associated with Seller unless otherwise specifically identified and noted in this document.
>
> d) Closing Obligations. Each individual that is party to this agreement is responsible for assuming any and all of their own obligations related to the closing of this agreement.

The only asset of the original petitioner, purchased by the business entity under the terms of this Stock Purchase Agreement are the 100 shares of stock owned by The Stock Purchase Agreement specifically states that all other assets of the petitioner, ., are excluded from the agreement and does not reflect the transfer of the essential rights, duties, and obligations of the petitioner, to the business entity, Inc. In addition, the record contains no evidence that a certificate of merger, exchange, or conversion documenting the transaction contained in the Stock Purchase Agreement between the petitioner, , and the business entity, Inc., has been filed with the Texas Secretary of State as required by the Texas Business Organizations Code, Title 1. General Provisions, Chapter 10. Mergers, Interest Exchanges, Conversions, and Sales of Assets, Subchapter D. Certificate of Merger, Exchange, or Conversion, sections 10.153 and 10.155.

Thus, the evidence of record fails to establish that the business entity, Inc., is the successor-in-interest to the entity that filed the immigrant visa petition, Accordingly, the petition cannot be approved for this reason.

Although not noted as a basis of denial by the director in the decision issued on September 6, 2012, the next issue to be examined in this proceeding is whether the petitioner, has demonstrated its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application was received by the DOL on October 21, 2011. The proffered wage as stated on the ETA Form 9089 is $125,000.00 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the record includes an IRS Form W-2, Wage and Tax Statement, reflecting that the petitioner, paid the beneficiary $151,041.57 in wages in 2011. The record contains a letter dated August 7, 2012 that is signed that is signed by the

petitioner's owner, In his letter, indicated that the petitioner had paid the beneficiary $78,125.00 in 2012 up through the date of his letter. However, the record is absent any independent evidence to corroborate the claim that the petitioner, , paid the beneficiary any wages in 2012. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that the record contains an IRS Form W-2 statement reflecting that the business entity, , paid the beneficiary $48,076.90 in wages in 2012. However, any wages paid by the business entity, ., will not be considered in the instant case as it has not been shown to be a valid successor-in-interest to the petitioner, . Further, as previously discussed, the evidence in the record of proceeding and information from the official website of the Office of the Comptroller of Texas confirms that the petitioner changed its name to with FEIN and that it is a separate and distinct corporate entity with active status from the business entity, , with FEIN . Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Although the petitioner established it paid the proffered wage of $125,000.00 to the beneficiary in 2011, the petitioner failed to establish that it paid the beneficiary any portion of the proffered wage in 2012 through an examination of wages paid.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings

> and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record is absent the petitioner's federal tax return for that portion of 2012, January up through August, it continued to operate as a separate corporate entity prior to the execution of the Stock

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[11] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Purchase Agreement between the petitioner's owner and the business entity, on August 16, 2012. The record is absent any explanation as to why the petitioner, was not required to file a federal tax return reflecting its income while it continued to operate as a separate and distinct business entity from January 2012 up through August 2012. Without a federal tax return, it cannot be determined whether the petitioner, possessed the ability to pay the proffered wage in 2012 through an examination of either its net income or net current assets for that year.

It is noted that the record contains the IRS Form 1120 tax return of the business entity, for 2012. However, the 2012 tax return of the business entity, ., will not be considered in the instant case as it has not been shown to be a valid successor-in-interest to the petitioner,

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the petitioner failed to demonstrate that it had the ability pay the proffered wage in 2012 through an examination of wages paid, its net income, and its net current assets. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary from the priority date in 2011 onwards.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish

eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.